AUTHORITY, LEGITIMACY AND OBLIGATION IN LAW'S EMPIRE (AND JUSTICE FOR HEDGEHOGS)

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My review-article in 1987 on *LE* began "*Law's Empire* will shape jurisprudence by its admirably resourceful attention to understanding a community's law 'internally'." And I called the article "On Reason and Authority in *Law's Empire*"[1] to foreshadow a discussion in which the authority of sources in legal reasoning, legal interpretation, and adjudication would be the main focus -- as it will not be this evening. In its short last section, the article looked at RMD's account of political authority and obligation, usually spoken of by him in terms of legitimacy and obligation – the obligation, moral in kind and political in focus and context, which we may have as citizens and subjects of a particular legal system and political community ("national community" (206) or state); and the legitimacy which is not a matter of permissibility or even of validity (like a legitimate move in chess), but essentially of authority or, as he usually prefers to say, power. And that is the topic of these reflections.

> My review article said that *LE*
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> "does offer a defence of the legitimacy of political authority. But it is very thin. It consists centrally of the claim that denying political legitimacy…entails denying, implausibly, the legitimacy of all other associative obligations, that is, the obligations which arise from family, friendship, and other fraternal relationships (see 207)."[2]

That, I have to say, is an excessively, unjustly thin account of what RMD says by way of explanation and defence of political authority in the argumentation, quite rich and engaging, that extends from 188 to 216. The explanation and defence emerges seamlessly out of the discussion of checkerboard statutes and the offence they do to integrity, in the section headed "Is integrity attractive?" (186). The defence of integrity is going to be found, he says, "in the neighborhood of fraternity or, to use its more fashionable name, community." (188). This section ends with several striking theses. One is that "Integrity infuses political and private occasions each with the spirit of the other to the benefit of both." (190) This continuity between public and

[1] Law & Philosophy 6 (1987) 357-80; now essay IV.12 in my *Collected Essays* (2011) vol IV, 280-98.
[2] *CEJF* IV, 295.

private has both practical and "expressive" value, an expressive value which "is confirmed when people in good faith try to treat one another in a way appropriate to common membership in a community governed by political integrity and see each other as making this attempt, even when they disagree about exactly what integrity requires in particular circumstances." (190)

> "Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one… [but] a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme." (190)

The section that immediately follows that passage, headed "The puzzle of legitimacy", prefaces the two succeeding two sections -- "Obligations of community" (195) and "Fraternity and political community" (206) – with a lucid and in substance though not vocabulary very traditional account of the general, presumptive, defeasible (my terms) authority of political (e.g. legislative or judicial) decisions and the inadequacy of social contract, or the general duty to be just, or (at least without supportive explanation) fair play (benefits and burdens) as grounds for predicating such moral authority or legitimacy with its entailed moral obligation. The explanation of why fair play survives (196) the apparently powerful counter-arguments (193-4) introduces the idea of associative or communal obligations, which can arise for one without one's consent but are lost "if other members of the group to not extend to [one] the benefits of belonging to the group" (196), that is, the benefit of receiving "what is due to [one] according to the standards of justice and fairness on which [the relevant group] is constructed" (195). For associative obligations have among their necessary conditions reciprocity (198) and "certain attitudes about the responsibilities [the members] owe one another if these responsibilities are to count as genuine fraternal obligations" (199). These attitudinal conditions are four, or have four elements:

(i) the attitude of regarding the group's obligations as special, obligations within the group; and

(ii) as personal obligations, running from member to member, "not just to the group as a whole in some collective sense"; and

(iii) as obligations flowing from a more general responsibility each has of concern for the well-being of others in the group"; they are

(iv) attitudes, indeed, of equal concern for all members (199-200).

A "community that meets genetic or geographical or other conditions identified by social practice as capable of constituting a fraternal community" is a "bare community"; a "bare community" that meets the four attitudinal conditions just listed is a "true [fraternal] community" (a nice strong use of what we call central case analysis), and its members will *have* the obligations of true community "whether or not they want them" (201). And – last stage in the argument – the best defence of political legitimacy/ authority/ obligation is one that shows political community – true political community – to be associative, communal, fraternal, by satisfying the four conditions in an appropriately political way. The particular thesis in this last stage is that this satisfying of the four conditions is possible (so far as any model could satisfy them "in a morally pluralistic society" (213)) if the political community in question is one "of principle" (211, 213). That is:

> "People are members of a genuine political community only when they [most of them: 201] accept that their fates are linked in [that] …they are governed by common principles, not just by rules hammered out in political compromise. … So each [for the most part: 201] member accepts that others have rights and that he has duties flowing from [a] scheme [of principle], even though these have never been formally identified or declared. Nor does he suppose that these further rights and duties are conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community has adopted that scheme, which is then special to it, not the assumption that he would have chosen it were the choice entirely his. In short, each accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of [genuine] political community." (211)

The rest of the argument on 213-6 just dots these i's and crosses these t's. The last words, on p. 216, somewhat deflatingly but perhaps unsurprisingly, say that all this is no more than a defence of "an interpretation of our own political culture, not an abstract and timeless political morality", though a defence "powerful on the second, political [and moral!] dimension of interpretation" as well as on the first dimension, of fit.

So this is very far from being the thin account I accused it of being. Its very traditional conclusions, and most at least of its distinctive and potent set of arguments, are restated in *Justice for Hedgehogs* in ch. 14, "Obligations", especially pp. 317-23.

There the word "authority" is even more completely banished in favour of the word "legitimacy", but the discussion is squarely of the political-moral authority of state government and law. Formally, this authority/legitimacy is presented as an entailment of the obligation to accept collective decisions that meet appropriate conditions (other than that we *wish* to, or safely *could*, disregard them: 320); and that obligation is presented as a pre-condition of dignity: unless we each had the obligation/responsibility *to each other* (320, top line) to comply with communal decisions, the enforcement of those decisions would be a tyranny, and bowing to the threats involved in enforcement would be to "abandon our dignity" (320), the dignity involved in one's special responsibility for one's own life. Of course, beneath this chain of entailments is a deeper premise, stated with maximal brevity (320): "We need the order and efficiency that only coercive government can provide to make it possible for us to create good lives and to live well. Anarchy would mean the end of dignity altogether."

In my review article, the complaint I made about *LE*'s account of authority/legitimacy/obligation was, I think, fair even though my rendering of that account was not:

> A principal weakness of [the] argument [that denying political authority entails denying all associative obligations], as [that argument is] developed in the book, is that these other fraternal associations are characteristically founded upon shared interest in substantive human goods, whereas the political community, so far as Dworkin invites us to envisage it, eschews any official concern—certainly any imposition of obligations on the basis of such concern—for substantive human goods such as health, knowledge, beauty, the transmission of human life and culture, and so forth. In this respect, the book, while it differs from Dworkin's earlier books by abstaining from explicitly (but cf. 274) describing itself as 'liberal', retains the salient characteristic of Dworkinian liberalism: it portrays justified politics, and thus law, as neutral about what is truly worthwhile and what worthless in human life.[3] It lacks any articulated concept of the common good, an ensemble of conditions which

[3] The unwillingness to speak of goods or harms is remarkably far-reaching. Thus, in the discussion of negligence, where we would expect a reference to harms we find only a reference to rights: see 293; cf. 307, 309, where, at last, the categories 'fundamental interests' and 'damage—e.g. threats to life' are acknowledged.

> favour the human flourishing (including rights) of all members of the community, and which ought to be promoted as well as respected by those in authority, and for the sake of which others acknowledge that authority.[4]

I think that RMD will protest (and would then, back in 1987, have protested) that tucked away in *LE* somewhere are propositions about what *Justice for Hedgehogs* rightly calls our *need* for the conditions for creating good lives and living well. Doubtless there are. But wherever they may be they were not (I believe) thematised, or shown to be coherent with "liberal neutrality".

In these darkening times we should push this line of thought a little further. *LE*'s very attractive vision of the political community as associative and fraternal is extremely close to, if not identical with, what Habermas and others have called "constitutional patriotism" and Jan-Werner Mueller has explored in his eponymous book. (Incidentally, the distinction on which much in *JfH* rests, between ethics and morality, is extremely close to if not identical with Habermas's identically worded distinction, and is subject to the same, I think fatal, objections.[5] [End of drive-by.]) The national community, as RMD at one point calls it, is treated as essentially a "proposition nation" (not RMD's term), self-identified by its – its own -- "scheme of principle". Mueller's survey and defence of constitutional patriotism admits that none of the versions or theories of this "post-conventional, post-traditionalist, post-nationalist belonging" goes *any way* to answering the question of the origins and boundaries of states – a weakness, he says, "of liberal thought more generally".[6] (But is a weakness in the whole Western mainstream tradition, as I have remarked apropos of Aquinas and all.[7]) But this talk of origins and boundaries is putting the matter too low -- partly missing the point -- as RMD does too in *JfH* at 319 when he brushes aside "the history of how political communities came to be formed and reformed": "only a series of historical and geographical accidents – where rivers run and kings slept -- has made the political boundaries of the US or France or any other place what they are. We must seek the moral force of fellow citizenship not in anything that preceded these accidental political groupings or explains them historically but rather in the contemporary consequences of these accidents." (319) But the question is not

[4] *CEJF* IV at 296, where footnote 3 above is n. 31.
[5] *CEJF* I at 48 = Ratio Juris 12 (1999) 354 at 361; Am. J. Juris. 43 (1998) 53 at 60-61.
[6] *Constitutional Patriotism* (Princeton UP 2007)
[7] *CEJF* II.6 at 107.

about boundaries but about the territorial mass and the people on it as a whole, nor is it about history as past events as such, but about such "contemporary consequences" of the constituting of a nation (or, as Rawls prefers to say, a [*this*] people) as the consequence that they share a culture. Rawls aptly uses Mill to provide us with an analysis of this central, cultural reality of a particular national community; it is a matter of--

> "(a) first, and primarily, the members of this people being 'united among themselves by common sympathies which do not exist between them and others', which (b) 'make them cooperate with each other more willingly than with other people …', and (c) may result from various causes, such as commonality of race, descent, language, and religion but 'strongest of all is identity of political antecedents … of national history, and consequent community of recollections, collective pride and humiliation, pleasure and regret, connected with the same incidents in the past'.[8] Then he articulates the legitimate fundamental interests of peoples: their political independence and their free culture; the security, territory and well-being of their citizens; and 'their proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments'[9]."[10]

The boundaries of the United States with Canada and Mexico are not merely or mainly a matter of where rivers run and kings slept, but of the historical balance of force and/or willingness between very substantial bodies of people, contesting massive territories in the interests of their collective self-determination, as English and French armies once contested vast swathes of France, and German and French armies and peoples later did likewise. We should certainly not subscribe to a Schmittian notion that every people needs an enemy; but we do need to add to *JfH*'s reference to "the order and efficiency that only coercive government can provide" (and to its allusion to the menace of "anarchy") a reference to the threats to a political

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8 *The Law of Peoples*, 23 n. 17 quoting J.S. Mill, *Considerations on Representative Government* (1862), ch. 16. For Rawls' tentative speculation about how far all these elements are necessary for a just constitutional regime, see *Law of Peoples*, 24–5.

9 *Ibid*., 34. For the implications of this kind of reality for a 'multiculturalist' politics, see my critical engagement with Joseph Raz's essays on multiculturalism (e.g. his 'Multiculturalism'), in essay II.6, sec. III.

10 *CEJF* II.7 at 124.

community's existence and self-determination that come, and have not at all ceased to come, from other communities, sometimes altogether outside its territories, contesting with it from outside, and sometimes inside, contesting with it from inside, as in the case of the Sudeten Germans in pre-War Czechoslovakia, or the Bosnian Muslims (for example) inside Yugoslavia or its rump at the turn of this century, or with the Mexican irredentists today within southerly regions of the US (who well remember the Anglophone immigrants into, and eventual internal conquerors of, Spanish and then Mexican Texas in the 1820s and 1830s).

JfH's discussion of political obligation concludes with a page headed "Tribal Obligations?". This is concerned to deny that cultural, historical, linguistic, religious and other such relationships, and bases for group identification, "are matters of associational obligation" or "bestow associational rights and obligations". They are rather a "powerful source of evil" – killing and destruction of communities. That is undeniable, and undeniably important. But it does not begin to refute the Rawlsian and Millian thesis that the maintenance of political communities of principle will often, if not always, *depend on* bonds of sympathy that suffice to enable a political community to survive attacks and adversities that otherwise would overwhelm it (and often also its principles) – to survive them, that is, even when its people is deeply divided about some of its most important principles, as the people of the United States are (witness RMD's *Is Democracy Possible Here?* (2006)). Rawls and Mill would readily concede to Dworkin that the sympathies and cultural links and bonds do not themselves create associational obligations, but would insist that they are frequently necessary preconditions – ongoing preconditions, permanently necessary -- for the political associating that does create them; that they enter into and become elements in the national political community's scheme of principle; and that both as preconditions and as elements they enable communities to survive, reasonably well, divisions about principle – other elements or potential or alleged elements in the scheme of principle – divisions that otherwise might well deliver them over to civil war and anarchy. That insistence seems right. *Given* the relationships that RMD writes off, or writes down, under the dismissive epithet "tribal", his four conditions for genuine political associational community can and often do exist sufficiently even in the absence of agreement on a scheme of principle that would satisfy the demands of integrity.

Let's set aside, finally, all those questions of cultural preconditions of political association, and revert to the objections I made in 1987 to *LE*'s treatment of political authority and obligation. One objection I have already recited: political obligation rests on a thicker, and in part earthier conception of common good than is captured by the "scheme of principle" on which *LE*'s complex conditions eventually come to rest – exemplified by the scheme of principle actually articulated in *LE* (and *JfH*). This objection becomes only the more relevant when *JfH* raises the stakes about schemes of principle by identifying as one of the two most fundamental political principles and preconditions of political legitimacy a notion of ethical independence – an independence from governmentally promoted ideas about virtues -- which there is strong reason to judge is incompatible with the demographic preconditions for a political community's long-tern sustainability and (under conditions such as we see in the European Union today) with the medium-term demographic-cultural conditions for a peaceful, democratic-Rule of Law polity.

The other objection was that *LE* minimised the problem of coordination and the need for adherence not only to schemes of principles but also to particular laws; and that the book's contrast between consensus based on convention and consensus of independent conviction left unmentioned and unaccounted for the consensus both presupposed by and vastly extended by legal stipulations of obligation, procedure, validity, etc. Though still terse about it, *JfH* is clearer that "the bare fact that this is the law give(s) me a further, distinctly moral, reason to obey it" (318). But I think the key step in the argument – that only coercive rules of law can provide the order and efficiency needed for good lives and living well – is taken too easily and shortly. The situation in *LE* in relation to the common good and law as a means to, and element in, that common good is a bit like the situation in *LE* in relation to the matters over which Hart laboured in the central chapters of *The Concept of Law*: primary and secondary rules, their dependence on the internal point of view, their union and their products (legal validity and so forth), are all swallowed up into a single sentence or two on p. 91 about the "preinterpretive" "data" provided by the "initial agreement about what practices are legal practices". Contemplating this vast disparity (which is not a conflict) between Hart's and Dworkin's treatments, one could write it off as no more than a consequence of the fact that the questions they were setting out to answer were so radically different: Dworkin's from end to end a question about justification and Hart's scarcely or not so at all. The disparity between *our* treatments of the common

good, coordination, and the point of law is not so easily set aside, since the initial questions we set out to answer are fundamentally the same.

About the workings of legal interpretation, I and I think all of us have learned and benefited greatly from RMD, not least in *LE*. About the reciprocities involved in good citizenship, I am still learning from both these deep-going works.